Supreme Court, U.S.
FILED
JUL 17 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1797

In the Supreme Court of the United States

OCTOBER TERM, 1990

JUAN RAMON MATTA-BALLESTEROS, PETITIONER

v.

GARY L. HENMAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, under international law and the Due Process Clause, United States courts would be deprived of jurisdiction to try petitioner if his allegations of forcible abduction from Honduras and torture at the hands of United States officials were found to be true.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is reported at 896 F.2d 255. The opinion of the district court (Pet. App. B1-B16) is reported at 697 F. Supp. 1040.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1990. The petition for a writ of certiorari was filed on May 18, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner sought a writ of habeas corpus in the United States District Court for the Southern District of Illinois, claiming that the government had illegally kidnapped him from his home in Honduras and tortured him before transporting him to the United States to face trial on pending criminal charges. The district court denied that motion without a hearing. Pet. App. B1-B16. The court of appeals affirmed. *Id.* at A1-A19.

1. The pertinent facts are summarized in the opinion of the court of appeals. Pet. App. A2-A4.[1] In 1971, petitioner, a Honduran citizen, escaped from the United States Prison Camp at Eglin Air Force Base in Florida and fled to Honduras. While in Honduras, he allegedly became heavily involved in the international narcotics trade. *Id.* at A2.

On the morning of April 5, 1988, petitioner, accompanied by his bodyguards, arrived at his home in Tegucigalpa, Honduras. On his arrival, he was surrounded by armed members of the Honduran Special Troops, who were joined by at least four United States Marshals. Allegedly at the direction of the Marshals, the troops arrested and handcuffed petitioner. A black hood was placed over his head and he was pushed onto the floor of a car driven by a Marshal. Pet. App. A2-A3.

The Marshals immediately took petitioner to a United States Air Force base approximately one-and-one-half hours away. According to his allegations, petitioner was severely beaten and burned with

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[1] Since the district court denied petitioner discovery and an evidentiary hearing, the court of appeals considered the facts alleged in the pleadings and affidavits in the light most favorable to petitioner. Pet. App. A2 n.1.

a "stun gun" during the ride, all at the direction of the Marshals.[2] After arriving at the base, petitioner was flown to the United States. During the flight, petitioner claims, the Marshals beat him and shocked him about the body, including on his testicles and feet. Pet. App. A3.

Upon his arrival in the United States, petitioner was immediately transferred to Marion Penitentiary. By that time, approximately 24 hours had passed since his apprehension. A physician examined petitioner and found abrasions on his head, face, scalp, neck, arms, feet, and penis, as well as blistering on his back. According to the physician, those injuries could have been caused by a stun gun. Pet. App. A3.

2. Thereafter, petitioner filed a petition for a writ of habeas corpus in the Southern District of Illinois, where Marion Penitentiary is located. Petitioner claimed that his apprehension violated the Honduran Constitution, international law, and the Due Process Clause of the United States Constitution. Asserting that the United States courts lacked jurisdiction to try him, petitioner demanded that he be released and returned to Honduras. Pet. App. A3.

At the time he sought the writ, petitioner was under indictment in the Northern District of Florida for escape, and in the Central and Southern Districts of California and the District of Arizona for various narcotics offenses. After filing the petition, he sought a preliminary injunction to prevent the government from transferring him to face prosecution in those

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[2] A "stun gun" is a non-lethal device often used to subdue individuals resisting arrest. It sends an electric pulse through the body of the victim causing immobilization, disorientation, loss of balance, and weakness. It leaves few, if any, marks on the body of the victim. Pet. App. A3 n.2.

districts. The district court denied the request for a preliminary injunction, concluding that petitioner had failed to establish that he had no adequate remedy at law or to show irreparable harm. *Matta-Ballesteros ex rel. Stolar* v. *Henman*, 697 F. Supp. 1036 (S.D. Ill. 1988). Pet. App. A3-A4.

3. After denying the preliminary injunction, the district court ordered an expanded record from the parties, including affidavits from petitioner and any witnesses. Based on the expanded record, the district court held that, even accepting the allegations about his arrest and rendition, petitioner was not entitled to the relief he sought. Pet. App. B1-B16. The court explained that petitioner lacked standing to seek relief based on international law or the Honduran Constitution (*id.* at B7-B9); that the Fifth Amendment does not divest a district court of jurisdiction over a fugitive, such as petitioner, based on allegations of torture in the arresting process (*id.* at B9-B10); and that even if a court could lose jurisdiction on that basis, petitioner's allegations did not rise to a "level of outrageousness" that would require such a result (*id.* at B13). Following the district court's denial of the writ, petitioner was transferred to a prison in Florida, and has since been convicted on the escape charge. *Id.* at A4.[3]

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[3] Prior to trial, the district court in Florida heard arguments similar to those presented here and decided that the United States had jurisdiction over petitioner. *United States* v. *Matta-Ballesteros*, 700 F. Supp. 528 (N.D. Fla. 1988). That decision has been appealed to the Eleventh Circuit. Petitioner has also raised the same claims before a district court in the Ninth Circuit. That court held that petitioner was collaterally estopped from litigating those claims because they had been fully and fairly litigated before the district court in the present case. Pet. App. A4-A5 n.3.

4. The court of appeals affirmed, concluding that petitioner's claims failed as a matter of law. Pet. App. A1-A19. The court first rejected the contention that petitioner's arrest violated the Honduran Constitution and two extradition treaties to which the United States and Honduras are parties. *Id.* at A9-A10. The court explained that "individuals have no standing to challenge violations of international treaties in the absence of a protest by the sovereigns involved." *Id.* at A9. Since the government of Honduras had registered no protest in the case, the court concluded that petitioner could not invoke principles of international law in challenging his prosecution.

The court of appeals next rejected petitioner's claim that his release was required by the Due Process Clause. Relying on this Court's decisions in *Ker* v. *Illinois*, 119 U.S. 436 (1886), and *Frisbie* v. *Collins*, 342 U.S. 519 (1952), the court of appeals explained that a court is not divested of power to try a person because of the means by which that person was brought within the court's jurisdiction. Pet. App. A10. The court also declined (*id.* at A16) to follow the Second Circuit's decision in *United States* v. *Toscanino*, 500 F.2d 267 (1974), where that court fashioned an exception to the *Ker-Frisbie* doctrine for cases involving "torture, brutality and similar outrageous conduct." Pet. App. A12.

Judge Will concurred. Pet. App. A17-A19. Instead of rejecting *Toscanino*, as the majority had done, Judge Will distinguished it on two grounds: first, "the torture Toscanino alleged was grossly more egregious than what [petitioner] alleges"; and second, unlike Toscanino, petitioner was a fugitive at the time of his abduction, and "release would

mean effectively commuting his earlier, lawfully imposed sentence." *Id.* at A17.

ARGUMENT

Petitioner contends that the district court lacks jurisdiction over him because of the circumstances surrounding his arrest. Petitioner invokes principles of international law, including two extradition treaties, as well as the Due Process Clause of the Fifth Amendment.

1. Petitioner cannot challenge his prosecution on the basis of international law. International agreements generally do not create private rights. See *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring), cert. denied, 470 U.S. 1003 (1985); *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1298 (3d Cir. 1979); *Dreyfus* v. *Von Finck*, 534 F.2d 24, 29 (2d Cir.), cert. denied, 429 U.S. 835 (1976); 2 Restatement (Third) of the Foreign Relations Law of the United States § 907, comment a (1987). Rather, treaties typically are "designed to protect the sovereign interests of nations, and it is up to the offended nations to determine whether a violation of sovereign interests occurred and requires redress." *United States* v. *Zabaneh*, 837 F.2d 1249, 1261 (5th Cir. 1988). See also *United States* v. *Davis*, 767 F.2d 1025, 1030 (2d Cir. 1985); *United States* v. *Cadena*, 585 F.2d 1252, 1260-1261 (5th Cir. 1978); *United States ex rel. Lujan* v. *Gengler*, 510 F.2d 62, 67 (2d Cir.), cert. denied, 421 U.S. 1001 (1975).

As this Court explained more than a century ago,

> A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the

> honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress.

Head Money Cases, 112 U.S. 580, 598 (1884). A treaty may, of course, contain provisions that create rights in individuals that are enforceable in the courts of one or both parties to the agreement, but even treaties that ultimately benefit individual interests ordinarily do not give individuals justiciable legal rights. 1 Restatement (Third) of the Foreign Relations Law of the United States § 111, reporters' note 4, at 53 (1987).

In determining whether a treaty creates enforceable rights for individuals, courts look principally to the intent of the parties to the agreement as it is reflected in the language of the treaty. *United States* v. *Postal*, 589 F.2d 862, 876 (5th Cir.), cert. denied, 444 U.S. 832 (1979). Treaties that set forth principles by which nations agree to abide in dealing with one another are not construed as addressed to the judicial branch or to create enforceable rights. 589 F.2d at 878; *Frolova* v. *Union of Soviet Socialist Republics*, 761 F.2d 370, 374 (7th Cir. 1985) (treaty phrased in "broad generalities" constitutes a "declaration[] of principles, not a code of legal rights" and does not "create a judicially-enforceable right"); *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d at 809-810 (Bork, J., concurring); *Diggs* v. *Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976) (treaty provisions in question "were not addressed to the judicial branch of our government"; "[t]hey do not by their

terms confer rights upon individual citizens; they call upon governments to take certain actions"). Only if the treaty "prescribe[s] a rule by which the rights of the private citizen or subject may be determined" will it be construed to create enforceable rights. *Head Money Cases*, 112 U.S. at 598-599.

Extradition treaties, in particular, are addressed to the mutual obligations of the contracting States; they are not made for the benefit of individuals who may be subject to their jurisdiction. See *United States* v. *Cordero*, 668 F.2d 32, 37-38 (1st Cir. 1981); *United States* v. *Valot*, 625 F.2d 308, 310 (9th Cir. 1980); *United States ex rel. Lujan* v. *Gengler*, 510 F.2d at 66-68. Accordingly, "[i]f the State in which [a] fugitive is found acquiesces or agrees, through its officers or agents, to a surrender accomplished even in the most informal and expeditious way, there is no element of illegality." *Id.* at 67. This is "no more than a particular application of the general principle that consent or acquiescence by the offended state waives any right it possessed, and heals any violation of international law." *Ibid.*

Petitioner does not claim that the government of Honduras made any official protest in this case. To the contrary, petitioner admits that the Honduran military cooperated in his arrest. In these circumstances, the court of appeals correctly concluded that "[petitioner's] claims of violations of international law do not entitle him to relief." Pet. App. A10.

Petitioner contends (Pet. 10), however, that this Court's decisions in *United States* v. *Rauscher*, 119 U.S. 407 (1886), *Ford* v. *United States*, 273 U.S. 593 (1927), and *Cook* v. *United States*, 288 U.S. 102 (1933), prohibit the United States from prosecuting a defendant who has been rendered for trial in violation of a treaty, even if the foreign government has

not lodged a protest. Those decisions do not support that proposition. In *Rauscher*, which involved formal extradition proceedings, the Court held only that a defendant may not be prosecuted for an offense other than one for which he was extradited. Nothing in *Rauscher* suggests that the parties to an extradition treaty may not waive the treaty's provisions. The *Cook* and *Ford* cases concerned a self-executing treaty, which, in light of its language and surrounding circumstances, the Court construed as specifically forbidding certain seizures on the high seas and granting enforceable rights to individuals not to be prosecuted if they were seized in violation of the treaty. Those cases "stand for the proposition that self-executing treaties may act to deprive the United States, and hence its courts, of jurisdiction over property and individuals that would otherwise be subject to that jurisdiction." *Postal*, 589 F.2d at 875. See also *Cordero*, 668 F.2d at 38.

Petitioner does not suggest that the treaties on which he relies are self-executing, that is, that they explicitly granted him an enforceable right not to be prosecuted. See *Cordero*, 668 F.2d at 38; *Postal*, 589 F.2d at 875. Instead, he simply quotes (Pet. 13 n.7) the statement from the opinion in *Ford* that *Ker* was inapplicable because "a treaty of the United States is directly involved." 273 U.S. at 605-606. The Court in *Ford* plainly did not mean to suggest that the principles of the *Ker* case are inapplicable any time a defendant invokes a treaty in objecting to a court's jurisdiction over him, since *Ker* itself involved an alleged violation of a treaty. The Court in *Ker* noted that the treaty in that case conferred no legal right on the defendant to object to the court's jurisdiction over him. By its cryptic reference to the "direct[] involve[ment]" of a treaty, the Court in

Ford appears to have meant that *Ker* is inapplicable in the face of a treaty, such as the one at issue in *Ford*, that grants the defendant the right not to be prosecuted if he is taken into custody in derogation of the provisions of the treaty. Nothing in the Court's opinion in *Ford* suggests that *Ker* is inapplicable where the treaty at issue is not "directly involved"—that is, where the treaty does not grant the defendant the right not to be prosecuted.[4]

This interpretation of *Ford* was confirmed by the Court's subsequent decision in *Cook* v. *United States*, *supra*. In that case, the Court held that the principles of *Ker* do not apply where a treaty between the United States and another nation expressly addresses the authority of the United States to arrest and try the citizens of the contracting nation, and precludes arrest and prosecution except according to its terms. As the Court explained, the treaty at issue in both *Ford* and *Cook* expressly addressed the right of the United States to seize and take vessels " 'into a port of the United States, its territories or possessions *for adjudication* in accordance with' the applicable laws." 288 U.S. at 121 (emphasis added). The treaty thus explicitly addressed and granted an immunity from "adjudication" where its terms were violated. For that reason, the Court concluded that "[t]o hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the Treaty." *Id.* at 121-122.

The two extradition treaties on which petitioner relies do not at all resemble the treaty at issue in *Ford* and *Cook*. The extradition treaties deal with

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[4] Indeed, the Court in *Ford* expressly rejected the proposition that an international treaty could confer immunity from prosecution on a defendant by implication. 273 U.S. at 611.

the mutual obligations of the contracting States to produce individuals in response to demands for their surrender. The treaties do not explicitly or even by implication bar a contracting State from trying a defendant if that State obtains custody of the defendant other than through the processes established by the treaties. Petitioner does not point to any authority for the "novel" proposition that extradition treaties "*forbid* foreign nations to return criminal defendants except in accordance with the formal procedures they contain." *Cordero*, 668 F.2d at 38. Indeed, in *Ker* v. *Illinois*, *supra*, decided the same day as *Rauscher*, this Court held just the opposite: that Ker's alleged abduction from Peru by an official of the United States government would not bar his prosecution in the Illinois courts, even though there was an extradition treaty in effect between Peru and the United States at the time, and even though the provisions of the treaty were not followed in Ker's case. See *United States* v. *Valot*, 625 F.2d 308, 310 (9th Cir. 1980).[5]

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[5] Petitioner also argues that his abduction from Honduras violated Article 102 of the Honduran Constitution, which provides that "[n]o Honduran citizen may be extradited nor turned over to the authorities of a foreign state." Pet. 4. Petitioner does not explain, however, why the Honduran Constitution has any force in the courts of the United States. The applicability of the Honduran Constitution is particularly improbable in light of the Honduran government's failure to protest petitioner's rendition. To the extent that petitioner suggests that Article 102 of the Honduran Constitution creates enforceable rights in United States courts because it is somehow incorporated in the two extradition treaties on which he relies, he is mistaken. The two treaties merely reserve the right to each contracting State not to be bound to deliver up its own citizens; the treaties do not impose an obligation on each contracting State not to request the de-

2. Nor does the Due Process Clause deprive the United States of jurisdiction to try petitioner. Following the decisions in *Ker* v. *Illinois*, *supra*, and *Frisbie* v. *Collins*, 342 U.S. 519 (1952), this Court has consistently held that the manner in which a defendant is brought within the jurisdiction of the court does not affect the ability of the United States to prosecute him. See *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984) ("The 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred"); *United States* v. *Crews*, 445 U.S. 463, 474 (1980) ("Respondent is not himself a suppressible 'fruit,' and the illegality of his detention cannot deprive the Government of the opportunity to prove his guilt"); *Gerstein* v. *Pugh*, 420 U.S. 103, 119 (1975) (pretrial detention in violation of the Fourth Amendment cannot justify immunity from prosecution for the prisoner).

In an attempt to circumvent the *Ker-Frisbie* doctrine, petitioner relies on *United States* v. *Toscanino*, 500 F.2d 267 (2d Cir. 1974). In that case, Toscanino challenged the authority of the court to try him, contending that his presence had been obtained

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livery of nationals of the other State or not to deliver their own nationals on request, and they certainly do not give the individuals any right not to be prosecuted when one State obtains custody of them with the permission, acquiescence, or assistance of the other State. See Extradition Convention, Jan. 15, 1909, United States-Honduras, art. VIII, 37 Stat. 1621, T.S. No. 569, at 895; Extradition Convention, Dec. 26, 1933, United States-American Republics, art. 2, 49 Stat. 3114, T.S. No. 882, at 154.

through kidnapping and torture. Toscanino offered to prove that he and his pregnant wife had been lured from their home in Montevideo, Uruguay, and that he was then knocked unconscious, placed in a car, bound and blindfolded, and driven across the border to Brazil. Once there, Toscanino alleged, he was interrogated for 17 days, intravenously fed at only a sustenance level, deprived of sleep, kicked and beaten, and made to walk the halls of his place of detention for seven or eight hours at a time. He further claimed that pliers were used on his fingers and that electrodes were attached to his earlobes, toes, and genitals and used to send jolts of electricity throughout his body. Toscanino claimed that a member of the Bureau of Narcotics and Dangerous Drugs of the United States Department of Justice was present throughout the brutal interrogation and that the United States Attorney was aware of and authorized all of these actions. Finally, Toscanino claimed that he was drugged by American agents and placed aboard an airliner destined for the United States. *Id.* at 269-270.

The Second Circuit held that the *Ker-Frisbie* doctrine would not apply to Toscanino's arrest and interrogation if the facts he alleged proved to be true. In the Second Circuit's view, the *Ker-Frisbie* doctrine had been substantially undermined by two developments in this Court's jurisprudence. First, in *Rochin* v. *California*, 342 U.S. 165 (1952), this Court held that the Due Process Clause prevented the use of evidence that was obtained by methods contrary to "canons of decency and fairness which express the notions of justice of English-speaking peoples," or conduct "that shocks the conscience." *Id.* at 169, 172. Second, in *Mapp* v. *Ohio*, 367 U.S. 643 (1961), the Court held that evidence seized in violation of the

Fourth Amendment was inadmissible in state criminal prosecutions. In the Second Circuit's view, this "erosion of *Frisbie*" was sufficient to suggest that it should be distinguished in a case like Toscanino's. 500 F.2d at 273.

Even in the Second Circuit, the *Toscanino* case lacks significant vitality. In *United States ex rel. Lujan* v. *Gengler*, *supra*, that court construed *Toscanino* as applying only where the defendant could prove "torture, brutality and similar outrageous conduct." 510 F.2d at 65. And to our knowledge, no court—including the *Toscanino* court, which remanded the case for factual findings—has ever required the United States to divest itself of jurisdiction because of the manner in which the defendant's presence was obtained. See also *United States* v. *Darby*, 744 F.2d 1508, 1531 (11th Cir. 1984) ("the continuing validity of the *Toscanino* approach is questionable"), cert. denied, 471 U.S. 1100 (1985).[6]

In any event, *Toscanino* is easily distinguishable from the present case. Unlike Toscanino—who alleged that his *initial* arrest was unlawful—petitioner was a fugitive from justice at the time of his arrest, having escaped from a federal prison in Florida. As Judge Will noted in his separate opinion, releasing petitioner would therefore "mean effectively commuting his earlier, lawfully imposed sentence." Pet. App. A17. See *United States* v. *Reed*, 639 F.2d 896,

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[6] Both petitioner (Pet. 9, 14) and the court of appeals (Pet. App. A12) state that the Ninth Circuit has followed *Toscanino*. In fact, however, the Ninth Circuit has not considered a case in which a showing similar to that in *Toscanino* has been made; accordingly, that circuit has yet to address the issue on the merits. See *United States* v. *Fielding*, 645 F.2d 719, 723 (9th Cir. 1981) ("The Ninth Circuit has not had occasion to apply the *Toscanino* rule").

902 n.2 (2d Cir. 1981) (distinguishing *Toscanino* on the ground that "Reed, unlike the defendant in *Toscanino*, was a fugitive from justice who had jumped bail, who was the subject of a bench warrant, and who had been sought for some weeks"). Moreover, as the district court found, petitioner's allegations of misconduct, even if true, "do not meet the required level of outrageousness, nor do they shock the conscience to the exten[t] that they would require the Court to afford [petitioner] the relief he seeks." Pet. App. B13. Accord *id.* at A17 ("the torture Toscanino alleged was grossly more egregious than what [petitioner] alleges").[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1990

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[7] Finally, petitioner contends (Pet. 12) that this Court should bar his prosecution under its supervisory power. Petitioner failed to make that argument in the court of appeals, however, and has therefore waived it. In any event, "[t]he values assigned to the competing interests do not change because a court has elected to analyze [a] question under the supervisory power instead of [the Constitution]." *United States* v. *Payner*, 447 U.S. 727, 736 (1980).

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